

Hanover Ins. Co. v TPG Contr. Corp.

2020 NY Slip Op 30624(U)

March 3, 2020

Supreme Court, New York County

Docket Number: 157348/2017

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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HANOVER INSURANCE COMPANY, as subrogee of
JANOVIC 1105 LLC d/b/a JANOVIC PAINT
& DECORATING CENTER,

Index No. 157348/2017

Motion Date: 1/8/2020

Plaintiff,

Motion Sequence Nos. 001 & 002

-against-

DECISION/ORDER

TPG CONTRACTING CORP.,

Defendant.

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TPG CONTRACTING CORP.,

Third-Party Plaintiff,

-against-

THETA DESIGNS, THOMAS GIZAS, VINCENT J.
LIOTTA, DAVID B. NICHOLSON and BLUARCH, LLC,

Third-Party Defendants.

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HON. ROBERT D. KALISH, J.S.C.:

Motion seq. 001 by third-party defendant Bluarch LLC pursuant to CPLR 3212 for summary judgment dismissing TPG Contracting Corp.'s Third-Party Verified Complaint against Bluarch, and dismissing all cross-claims against Bluarch as a matter of law, is granted for the reasons stated herein.

Motion seq. 002 by plaintiff Hanover Insurance Company (Hanover) pursuant to CPLR 3212 for partial summary judgment as to liability under Count I (negligence) and Count (II) (breach of warranty) is granted as to the negligence claim but denied as to the breach of warranty

claim, for the reasons stated herein.

Motion Sequence Numbers 001 and 002 are consolidated for disposition in the instant memorandum decision and order.

BACKGROUND

This is a subrogation action wherein Hanover, as subrogee of non-party insured Janovic 1105 LLC d/b/a Janovic Paint and Decorating Center (Janovic), seeks to recover for property damage and business losses sustained as a result of a ceiling collapse at 520 Broome Street, New York, New York (*see* Oral Arg. Tr. at 15-17). Hanover alleges that the collapse resulted from the negligence of Janovic's contractor, TPG, in failing to hang the ceiling with the expansion bolt anchors specified by the architectural firm, third-party defendant Bluarch.

In 2015, Janovic leased the first floor retail space located at 520 Broome Street, New York, New York (Mantikas Tr. at 32). At the time, the space was an unoccupied "white box" that Janovic needed to transform or "fit out" so that it could use the space as its flagship store. (Di Oronzo Tr., at 17; Smith Aff. ¶ 11). Janovic hired third-party defendant Theta Designs (Theta), a consulting and design business, to design certain aspects of the interior space (Gizas Tr. at 37: 46-48). Thomas Gizas is the principal of Theta Designs (*id.*, at 10-11). Gizas, who is not a licensed architect (*id.*, at 21-22), worked with third-party defendant David Nicholson, who is a licensed architect. (*id.*, at 24-26, 36). When Theta Designs needed to file signed and sealed drawings with the New York City Department of Buildings (NYCDOB), Nicholson acted as the architect of record (*id.* at 19).

In March of 2015, Theta Designs prepared drawings for the interior fit-out of the Janovic retail space (Smith Aff. ¶ 14; Gizas Tr. at 54-56). Because providing ceiling

details was not within Theta's scope of work, as agreed upon by Janovic and Theta, the drawings did not contain ceiling details (id. at 68). Nicholson submitted the drawings to the NYCDOB on June 19, 2015 (Nicholson Tr. at 22-26; Smith Aff. ¶ 14) and the NYCDOB accepted the drawings and issued a permit on July 16, 2015 (Smith Aff. ¶ 14).

The work that the NYCDOB approved did not include fit-out work on the ceiling (Smith Aff. ¶ 14; Giza Tr. at 68). Accordingly, Janovic also hired Bluarch, an architectural firm (Di Oronzo Tr. at 7, 23-24; Smith Aff. ¶ 15) to design portions of the interior space, including the ceiling design (Di Oronzo Tr., at 40-41). Bluarch prepared drawings, dated June 16, 2015, which called for the ceiling to be hung from a "typical" pencil rod hanging system consisting of ceiling anchors, pencil rods, and hat/carrying channels (Smith Aff. ¶ 15; Di Oronzo Tr. at 57-58). Of particular relevance here, the plans also called for the use of NYC Approved Expansion Bolt Anchors (Smith Aff. 17; Kladias Tr. at 10; Di Oronzo Tr. at 48-49). However, the plans Bluarch prepared were never submitted to the NYCDOB or made part of the DOB-approved work (Smith Aff. ¶ 30).

Janovic hired TPG to act as the general contractor for the fit-out work (Kladias Tr. at 8-9). TPG assigned Nick Kladias (Kladias) as the project manager (id.). To perform its work on the ceiling, TPG used the Bluarch plans, which were never approved by the Department of Buildings (Kladias Tr. at 20). Instead of using the NYC Approved Expansion Bolt Anchors specified by Bluarch's plans, TPG used three-inch-long hammer-driven Zamac Nailin nail anchors (Mushroom Head with Carbon Steel nails) to hang the ceiling from the concrete deck above (Smith Aff. ¶ 22; Kladias Tr. at 80-82). The information sheet for Zama Nailing nail anchors stated that they were "not recommend[ed] for overhead, life-safety or sustained tensile

loading applications” (Zamac Nailin Information Sheet). The ceiling collapsed on November 28, 2016 (Smith Aff. ¶ 32).

Hanover commenced this action on August 16, 2017 and filed an amended complaint on November 22, 2017, asserting claims for negligence and breach of warranty. TPG answered on November 27, 2017 and filed third party claims against Theta, Gizas, Nicholson, Bluarch and Thomas J. Liotta on July 5, 2018. All third parties answered, with Bluarch and Liotta cross claiming against the other third-party defendants for contribution and indemnification, and those third-party defendants similarly cross claiming against Bluarch and Liotta. Liotta also cross claimed against the other third-party defendants for failing to obtain insurance. By order dated December 10, 2019, this court granted, without opposition, Liotta’s motion (Seq. 003) to dismiss the third-party complaint and all cross claims against it with prejudice (NYSCEF Document No. 152).

DISCUSSION

Hanover’s Motion for Partial Summary Judgment (Seq. 002)

Hanover moves for partial summary judgment against TPG as to liability on both its negligence and breach of warranty claims. In support of its motion, Hanover has submitted the affidavit of Nathaniel B. Smith, a licensed professional engineer who regularly investigates structural failures. Smith based his analysis of the incident upon observations made during site inspections, surveillance video—showing the ceiling before, during, and after the collapse—post loss photographs, the physical evidence removed from the site, NYCDOB construction records, New York City Building Code requirements, deposition testimony Kladias, Nicholson and Gizas, deposition testimony from Professional Engineer Vincent Liotta and Registered Architect

Antonio Di Oronzo, the principal of Bluarch, and the Powers Fasteners product brochure for the “Zamac Nailin” anchors that TPG utilized to hang the ceiling. Smith concluded, to a reasonable degree of professional certainty, that:

“TPG breached the standard of care and that each of the actions and/or inactions of TPG caused the Janovic ceiling failure. More specifically: (a) TPG was responsible for all ceiling construction and hanging means and methods; (b) TPG should have understood the meaning of the commonly used term “typical” and sought clarification of any specifications that it did not understand; (c) the standard of care requires that contractors perform their work in compliance with the Building Code and the construction drawings; (d) TPG performed the ceiling work without an approved set of drawings, in direct violation of the Building Code; (e) TPG should have, consistent with the standard of care, calculated, but did not calculate, or have someone else calculate, the weight of the ceiling and secured appropriate “NYC APPROVED EXPANSION BOLT ANCHOR[S]” to use on the ceiling; (f) TPG did not follow the Bluarch drawings or Building Code requirements and utilize “NYC APPROVED EXPANSION BOLT ANCHOR[S]” to carry the weight of the ceiling; (g) although the standard of care requires construction contractors to follow a manufacturer’s instructions, TPG utilized Zamac Nailin anchors that the product manufacturer did not recommend for overhead or sustained tensile loading applications; and loaded the Zamac Nailin anchors beyond what was recommended by manufacturer.”

(Smith Aff. ¶ 44).

In opposition, TPG has not countered Smith’s opinion with an expert affidavit. Instead, it relies upon an affidavit of counsel which summarizes the deposition testimony and concludes that “multiple causes led to the ceiling collapse” (Lima Aff. ¶ 175). He opines that Janovic failed to properly monitor the project, creating “confusion” by retaining multiple designers and architects without setting up a system of oversight. He points out that Bluarch failed to file the plans it provided to TPG with the NYCDOB, and faults Bluarch for failing to include the weight of the ceiling in the plans.

Plaintiff’s motion for partial summary judgment as to liability on the negligence claim is granted.

Through its expert's affidavit, plaintiff established a prima facie case that TPG's failure to use the proper NYC Approved Expansion Bolt Anchors was the cause of the collapse, and TPG failed to counter this finding with an expert affidavit of its own or other evidentiary proof to create an issue of fact (*see Benitez v United Homes of New York, LLC*, 142 AD3d 867, 867 (1st Dept 2016); *Whelan by Whelan v. GTE Sylvania Inc.*, 182 AD2d 446, 449–50 [1st Dept 1992]). TPG's attorney's affirmation opining on the cause is without probative value (*Jones v 3417 Broadway LLC*, 172 AD3d 551 [1st Dept 2019]; *Faiella v Oradell Constr. Co., Inc.*, 171 AD3d 1013, 1014 [2d Dept 2019]). And although TPG has speculated that the negligence of plaintiff's subrogor, Janovic, or other parties may have also contributed to the collapse, that question does not prevent the court from granting plaintiff's motion. "To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (*Rodriguez v City of New York*, 31 NY3d 312, 324–25 [2018]). At trial, the jury will be instructed as to the finding of negligence against TPG, and TPG will bear the burden of proffering evidence establishing the partial liability of others.

Plaintiff is not entitled, however, to summary judgment on its breach of warranty claim. There was no written contract between Janovic and TPG. Although a warranty may be oral (*see, e.g., Cottonaro v Southtowns Indus., Inc.*, 213 AD2d 993, 993 [2d Dept 1995]), plaintiff has not pled either the existence of such a warranty or elaborated upon its terms or pointed to any evidence in the record to support such a claim. Plaintiff's reliance on *Van Deloo v Moreland*, (84AD 2d 871 [3d Dept 1981]), is misplaced, as in that case the court, found, after a bench trial, that the defendant had breached an express contractual warranty term requiring that the

construction be done “in a workmanlike manner according to standard practices” (*id.* at 871).

Bluarch’s Motion for Summary Judgment (Seq. 001)

In view of the determination that TPG’s admitted failure to use the proper NYC Approved Expansion Bolt Anchors was the cause of the collapse, Bluarch cannot be held liable for contribution or indemnity. Moreover, TPG admits that it alone performed the weight calculations on the ceiling (Oral Arg. Tr. at 25-28). A design professional may not be held liable by a contractor that fails to follow, or does not rely upon, its plans, as under such circumstances the plans cannot be the proximate cause of the accident (*Travelers Indem. Co. v. Zeff Design*, 60 AD3d 453, 455 [1st Dept 2009]; *492 Kings Realty, LLC v 506 Kings, LLC*, 105 AD3d 991, 994 [2d Dept 2013]; *Bruno v. Trus Joist a Weyerhaeuser Bus.*, 87 AD3d 670, 672–73 [2d Dept 2011]). Furthermore, Bluarch’s failure to file the plans is irrelevant, as that failure was not the cause of the collapse (*Security. Ins. Co. of Hartford v Architron Designers & Builders, Inc.*, 82 AD3d 472, 473 [1st Dept 2011] [“these provisions require the filing of plans but do not provide any substantive standards specifying, for example, when shoring may be required in an excavation project . . . [h]ence, plaintiff cannot show a causal relationship between its alleged loss and any negligence on [defendants’] part in failing to file allegedly ‘complete’ plans”]). Finally, Bluarch’s motion to dismiss any other claims against it is granted as unopposed. In this connection, the court also notes the concession of TPG’s counsel that the allegations of TPG’s tenth and fifteenth causes of action against Bluarch for contractual indemnification and failure to procure insurance are mere boilerplate and that there are no existing agreements between TPG and Bluarch giving rise to such obligations.

CONCLUSION

Accordingly, it is

ORDERED that the motion of plaintiff Hanover Insurance Company, as Subrogee of Janovic 1105 LLC d/b/a Janovic Paint & Decorating Center ("plaintiff"), for summary judgment is granted as to liability as to its claim for negligence as against defendant TPG Contracting Corp., and it is otherwise denied; and it is further

ORDERED that the motion of third-party Bluarch, LLC ("Bluarch") for summary judgment dismissing the third-party defendant TPG Contracting Corp.'s Third-Party Verified Complaint against Bluarch and dismissing the third-party complaint and all cross-claims against it is granted, and the third-party complaint and all cross claims asserted against third-party Bluarch are dismissed with costs and disbursements to that defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

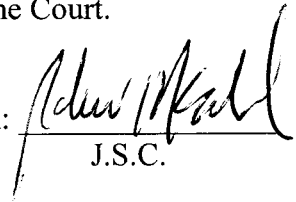
ORDERED that plaintiff shall, within 10 days from the NYSCEF filing date of the decision and order on this motion, serve a copy of this order with notice of entry upon the remaining parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that the parties shall appear for the previously scheduled conference in the Early Settlement Part at 10:00 AM on March 27, 2020.

The foregoing constitutes the decision and order of the Court.

Dated: 3/03/2020

ENTER: 
J.S.C.